Supreme Court, U.S.
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No. 92-855

In the Supreme Court of the United States

OCTOBER TERM, 1992

JON HAROLD ROYAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's 30-year prison sentence exceeded the maximum penalty authorized by 21 U.S.C. 841(b).

2. Whether it was proper for the prosecutor to cross-examine a defense witness about the fact that the witness's mother urged him to give false testimony favoring petitioner.

3. Whether the admission of evidence that one of petitioner's customers died of an overdose of cocaine was harmless error.

4. Whether evidence seized during a warrant-authorized search of petitioner's residence should have been suppressed.

5. Whether petitioner was denied his Sixth Amendment right to the effective assistance of counsel at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 972 F.2d 643.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1992. A petition for rehearing was denied on September 30, 1992. The petition for a writ of certiorari was filed on November 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 30 years' imprisonment, to be followed by ten years' supervised release. He was also fined $25,000. The court of appeals affirmed. Pet. App. A1-A17.

1. The evidence at trial showed that from 1985 through 1990, petitioner conspired with David LeBoeuf and others to traffic in multiple kilograms of cocaine. In May 1985, petitioner had been arrested for selling cocaine to an undercover law enforcement agent in 1983. Petitioner pleaded guilty to federal charges stemming from the 1983 sale and began serving a prison sentence for his conviction on those charges in April 1986.

Neither petitioner's 1985 arrest nor his subsequent conviction and imprisonment ended his drug trafficking. Instead, he enlisted others to carry on his drug operations during that period. Petitioner originally planned to use Gino Hernandez, a friend and customer, to help carry on the operations. In January 1986, however, Hernandez died from an overdose of cocaine. Petitioner then turned to David LeBoeuf. Petitioner had previously sold cocaine to LeBoeuf on a regular basis, selling him a kilogram every four to six weeks for $58,000. Various drivers, including Trey Huddleston, Jay Husik, and Arufa Rehman, transported the cocaine from Houston to Austin, Texas, where LeBoeuf resold it. Pet. App. A2-A3; Gov't C.A. Br. 2-3.

After his 1985 arrest, petitioner asked LeBoeuf to help him transport cocaine to Texas from Florida, where petitioner had been obtaining the cocaine. Petitioner explained that Arufa Rehman, who had previously transported the cocaine, had been arrested at the same time as petitioner and was therefore out of commission. LeBoeuf agreed to have his brother-in-law, Jay Husik, take over as the Florida-to-Texas driver in return for $2500 per trip. After that agreement was made, petitioner supplied Husik with more than $13,000 to purchase a van to transport the cocaine. Pet. App. A2-A3; Gov't C.A. Br. 2-3.

Petitioner accompanied Husik on Husik's first trip to Florida to make sure that Husik knew where to go. After they picked up the cocaine in Florida, Husik drove it back to Texas. Thereafter, Husik made between five and ten additional trips to Florida to pick up cocaine for petitioner. Pet. App. A2-A3; Gov't C.A. Br. 4.

When it became clear that petitioner would be imprisoned on the 1985 drug trafficking charges, petitioner and LeBoeuf discussed LeBoeuf's taking over the drug business while petitioner was in prison. To that end, petitioner introduced LeBoeuf to Carmen Asseo, petitioner's Florida supplier of cocaine, and arranged to have LeBoeuf assume petitioner's former role. Under the arrangement, LeBoeuf agreed to pay petitioner commissions on the cocaine that LeBoeuf obtained from Asseo and delivered to Texas. Pet. App. A3; Gov't C.A. Br. 4-5.

During the three years that petitioner was in prison, LeBoeuf bought cocaine in Florida from Asseo and her husband, Oscar Ramirez, but when petitioner

was released from prison on parole, LeBoeuf reneged on his agreement to pay petitioner commissions on the cocaine. Husik did, however, have Trey Huddleston deliver 500 grams of cocaine to petitioner in LaGrange, Texas. In addition, LeBoeuf gave petitioner $13,000 to use as collateral for a bank loan. Pet. App. A3; Gov't C.A. Br. 4-5.

Subsequently, petitioner was indicted on federal drug charges, and federal agents obtained a warrant to search his Houston residence. At the time, petitioner was living with his former co-defendant Arufa Rehman and her son, Kalim Tippit, in violation of his parole conditions. When they executed the warrant, agents found cocaine, a triple-beam scale, drug records, and firearms. Specifically, in petitioner's bedroom, the agents found a plastic bag containing 27.35 grams of cocaine; underneath the mattress of petitioner's bed, they found three firearms; and in a box beside petitioner's bed, they found the triple-beam scale. In the adjacent bathroom, they found another, larger plastic bag containing trace amounts of cocaine. In the living room, they found an address book with petitioner's name on it that contained numerical computations involving common illegal drug weights. Pet. App. A3; Gov't C.A. Br. 5-6.

2. At trial, petitioner testified in his own defense. He admitted that he had engaged in drug trafficking with LeBoeuf and others prior to his 1985 arrest. According to petitioner, however, that arrest and his subsequent conviction scared him out of the drug business. Gov't C.A. Br. 5-8.

Petitioner admitted having many post-arrest and post-conviction contacts with drug traffickers, but he claimed that those contacts were for social or legitimate business purposes. For example, petitioner admitted paying Husik more than $13,000 to buy a van in June 1985, the month after petitioner's arrest. He also admitted that in June 1985 he drove to Florida with Husik; he denied, however, that the trip was connected with drug trafficking. Petitioner further admitted that, in early 1986, he and LeBoeuf took petitioner's plane to Florida, where they met with petitioner's cocaine supplier, Carmen Asseo. According to petitioner, the meeting did not concern drugs. Gov't C.A. Br. 6-7.

Petitioner admitted that he violated his parole in 1990 by moving into the Houston residence with his former co-defendant Arufa Rehman. He also admitted that the bedroom in which the cocaine and the triple-beam scale were found was his bedroom. Petitioner claimed that he did not know how the cocaine or the scale came to be in his bedroom. He admitted that he owned the three guns found under the bed. He also admitted owning the address book containing numerical computations, but he claimed that the computations concerned gambling debts, not drug weights. Gov't C.A. Br. 8.

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A17. It found no reversible error in the district court's evidentiary rulings. In particular, the court of appeals held that, although it was error to admit evidence that one of petitioner's customers died from an overdose of cocaine supplied by petitioner, the error was harmless because the

"evidence of [petitioner's] involvement in the cocaine conspiracy was overwhelming, supported by the testimony of LeBoeuf, Husik, and LeBoeuf's brother, who also transported drugs for LeBoeuf, as well as by the physical evidence found in [petitioner's] home." *Id.* at A5. The court of appeals next held that the government was properly allowed to cross-examine a defense witness, Kalim Tippit, about the fact that his mother had urged him to give false testimony favoring petitioner. *Id.* at A5-A6. The court determined that the cross-examination was "clearly relevant to the jury's evaluation of Tippit's credibility and his possible bias." *Id.* at A6. The court also upheld the admission of evidence of petitioner's prior drug dealings with LeBoeuf and petitioner's arrest and imprisonment in 1985, holding that those incidents were "inextricably intertwined" with the offense charged in this case. *Id.* at A7-A11.

The court of appeals held that the evidence found in petitioner's residence during the warrant-authorized search was properly admitted. Pet. App. A6-A7. The court observed that the warrant was supported by a 12-page affidavit describing petitioner's "continuing [drug] involvement with his co-conspirators" during "several years prior to the issuance of the warrant." *Id.* at A6 & n.3. The court found it unnecessary to decide whether, as petitioner had asserted, the information in the affidavit was stale. The court held that, in any event, the agents had relied on the warrant in good faith, and the affidavit was not "so lacking in indicia of probable cause" that their reliance was objectively unreasonable. *Id.* at A7.

The court rejected petitioner's challenge to the jury instruction regarding multiple conspiracies, to which petitioner had not objected at trial.[1] The court reasoned:

> The [district] court's multiple conspiracy instruction reflects that [petitioner] was charged in the indictment with one conspiracy. The court's instruction told the jury to convict [petitioner] only if each juror believed beyond a reasonable doubt that he had participated in that conspiracy. Accordingly, there was no error in the [district] court's failure to offer a special unanimity instruction, let alone plain error.

Pet. App. A12.

The court likewise found no plain error in the jury instruction regarding the time period of the charged conspiracy. Petitioner had claimed on appeal that the jury might have found him guilty based on conduct for which prosecution was barred by the statute of limitations. The court observed that the indictment charged petitioner only with conduct occurring between May 1985 and April 1990. Pet. App. A12-A13. Although the jury was instructed that the government was required to prove only that the charged conspiracy occurred "reasonably near" the dates charged in the indictment, the court of appeals

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[1] The district court instructed the jury (Pet. App. A11 n.8):

> If you believe that the evidence has shown the existence of multiple conspiracies, you may not find [petitioner] guilty unless you find beyond a reasonable doubt that he was a member of the conspiracy charged in the indictment and not some other separate conspiracy.

explained that the "conspiracy involved an agreement which necessarily must have occurred *after* [petitioner] was arrested and knew that he would be going to prison." *Id.* at A12-A13. The court of appeals accordingly concluded that the district court's "failure to narrow the dates for the jury was not plain error." *Id.* at A13.[2]

The court of appeals also rejected petitioner's contention that his sentence of 30 years' imprisonment exceeded the statutory maximum. Pet. App. A13-A15. The court determined that the proof established that petitioner's conspiracy involved more than five kilograms of cocaine and that petitioner was therefore subject to the statutory provision prescribing a penalty of 10 years' to life imprisonment for offenses involving five or more kilograms of cocaine. *Id.* at A13-A14. The court rejected petitioner's argument that that provision did not apply because the indictment had not alleged that more than five kilograms was involved in his offense. The court held that drug "quantity is not an element of the offense[]" and therefore need not be alleged in the indictment. *Id.* at A14-A15.

ARGUMENT

1. Petitioner renews his contention (Pet. 7-10) that his sentence of 30 years' imprisonment exceeds the statutory maximum sentence. The court of appeals

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[2] The court of appeals separately rejected petitioner's claim of ineffective assistance of counsel at trial, which was based on the failure of his trial counsel to object to the jury instructions on multiple conspiracies and the time period of the conspiracy and to certain evidentiary rulings by the district court. Pet. App. A15-A17.

correctly rejected that contention (Pet. App. A13-A15), and its decision does not conflict with that of any other court of appeals.

Petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Section 846 provides that persons convicted under that provision "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." 21 U.S.C. 846. The object of the conspiracy on which petitioner was convicted was the possession of cocaine with intent to distribute it, a violation of 21 U.S.C. 841(a). Petitioner was therefore subject to the penalties governing violations of Section 841(a), which are set forth in 21 U.S.C. 841(b).

Section 841(b) prescribes penalties for violations of Section 841(a) based on the drug quantities (in this case, cocaine) involved in the offense of conviction. Offenses involving five kilograms or more of cocaine are punishable by a prison term of 10 years to life (21 U.S.C. 841(b)(1)(A)(ii)); offenses involving 500 grams or more of cocaine are punishable by a prison term of five to 40 years (21 U.S.C. 841(b)(1)(B)(ii)); and all other cocaine offenses (except those involving death, serious bodily injury, or repeat offenders) are punishable by a prison term of up to 20 years (21 U.S.C. 841(b)(1)(C)).

In this Court, petitioner does not dispute that the evidence at trial proved that he trafficked in far more than five kilograms of cocaine. Instead, he argues that he was not subject to the penalty prescribed in 21 U.S.C. 841(b)(1)(A)(ii) for offenses involving five kilograms or more of cocaine because the indictment

did not allege that his offense involved more than five kilograms of cocaine. Petitioner is mistaken.

An indictment is adequate if it alleges the essential elements of the charged offense with sufficient detail and clarity to enable the defendant to prepare a defense, to ensure that the defendant is prosecuted based on the facts presented to the grand jury, to inform the court of the facts alleged so that it can determine the sufficiency of the charge, and to furnish the defendant with grounds for pleading former jeopardy in any later prosecution. *Russell* v. *United States*, 369 U.S. 749, 763, 768 n.15 (1962). The elements of the offense with which petitioner was charged are fully set forth in Sections 846 and 841(a) of title 21. The penalties prescribed in Section 841(b) are not elements of the offense; by their terms, they apply only after a person has been found to have committed the offense. See 21 U.S.C. 841(b) ("[A]ny person who violates subsection (a) of this section shall be sentenced as follows").

Accordingly, every court of appeals has held that quantity is not an element of an offense under 18 U.S.C. 841(a)(1) and 846 but rather is solely an issue for the court to decide at sentencing. See *United States* v. *McHugh*, 769 F.2d 860, 868 (1st Cir. 1985); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.), cert. denied, 111 S. Ct. 363 (1990); *United States* v. *Gibbs*, 813 F.2d 596, 598-601 (3d Cir.), cert. denied, 484 U.S. 822 (1987); *United States* v. *Powell*, 886 F.2d 81, 85 (4th Cir. 1989), cert. denied, 493 U.S. 1084 (1990); *United States* v. *Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States* v. *Hodges*, 935 F.2d 766, 769-770 (6th Cir.), cert. denied, 112 S. Ct. 251 (1991);

United States v. *Levy*, 955 F.2d 1098, 1106 (7th Cir.), cert. denied, 113 S. Ct. 102 (1992); *United States* v. *Wood*, 834 F.2d 1382, 1389 (8th Cir. 1987); *United States* v. *Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991), cert. denied, 112 S. Ct. 1186 (1992); *United States* v. *Ware*, 897 F.2d 1538, 1542-1543 (10th Cir.), cert. denied, 496 U.S. 930 (1990); *United States* v. *Cross*, 916 F.2d 622, 623 (11th Cir. 1990) (per curiam), cert. denied, 111 S. Ct. 1331 (1991); *United States* v. *Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992).

Contrary to petitioner's assertion (Pet. 8-10), the Federal Rules of Criminal Procedure do not require that an indictment charging a violation of the Controlled Substances Act must, in addition to alleging the essential elements of the offense, specify the amount of the controlled substance involved. Indeed, Fed. R. Crim. P. 7(d) discourages the inclusion of surplusage in an indictment. Other Rules ensure that a criminal defendant receives timely notice of the possible penalties for his offense, and none of those Rules requires that notice be provided in the indictment. Specifically, Rule 11(c)(1) requires the trial court to advise a defendant of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law" at the time the defendant offers a plea of guilty or nolo contendere. Rule 32(a)(1) contemplates that, "[p]rior to the sentencing hearing," all defendants will be advised in a presentence report of "the sentencing classifications and sentencing guideline range believed to be applicable to the case." Fed. R. Crim. P. 32(a)(1); see also Fed. R. Crim. P. 32(c)(2); cf. *Burns* v. *United States*, 111 S. Ct. 2182, 2185-2188 (1991) (under

Rule 32, defendant is entitled to presentence notice of court's intention to depart from Sentencing Guidelines).[3]

Nor is there any statutory basis for requiring that the indictment against petitioner include an allegation regarding quantity. Significantly, in a provision that does not apply here, Congress expressly required pretrial (as opposed to presentence) notice to defendants of matters bearing on statutory penalties for drug offenses. That provision, 21 U.S.C. 851(a), requires that persons subject to "increased punishment" under Section 841(b) as a result of prior convictions must be notified of those prior convictions before either trial or entry of a guilty plea. Presumably, if Congress had intended to impose a similar requirement with respect to the quantity of drugs involved in the offense, it would have expressly included such a requirement.[4]

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[3] As the court of appeals observed, petitioner received notice that the government was seeking the penalty for offenses involving five or more kilograms of cocaine "several days after the jury returned its guilty verdict and three months before his sentencing," and thereafter in the presentence report. Pet. App. A14.

[4] Some courts, while holding that drug quantity is not an element of the offenses prescribed in Section 841(a) and 846, have left open the question whether the indictment must include allegations regarding drug quantity. See, *e.g.*, *Gibbs*, 813 F.2d at 599 (decision of Third Circuit stating: "we need not, and do not, decide whether the enhanced sentence could stand in the absence of notice in the indictment"); *United States* v. *Paiz*, 905 F.2d 1014, 1032-1033 (7th Cir. 1990) (dictum suggesting that quantity must be alleged in the indictment), cert. denied, 111 S. Ct. 1319 (1991). Notwithstanding the dictum in *Paiz*, the Seventh Circuit recently held that allegations

In arguing to the contrary, petitioner relies (Pet. 8) on *United States* v. *Alvarez*, 735 F.2d 461, 466-468 (11th Cir. 1984). In *Alvarez*, the Eleventh Circuit held that "[s]ince the quantity of the substance constitutes a critical element of the offense under [former] 21 U.S.C. 841(b)(6)," a defendant could not receive an enhanced sentence based on amounts of marijuana not alleged in the indictment. Petitioner's reliance on *Alvarez* is misplaced.

The current version of Section 841 differs significantly from the version of Section 841 at issue in *Alvarez*. Former Section 841(b) contained a general provision prescribing a maximum penalty of five years' imprisonment, 21 U.S.C. 841(b)(1)(B) (1982), and a separate provision prescribing a maximum sentence of 15 years' imprisonment for offenses involving more than 1000 pounds of marijuana, 21 U.S.C. 841(b)(6) (1982). In contrast, the current version of Section 841(b) does not establish any presumptive sentence for cocaine offenses with a separate enhancement feature. Accordingly, the analysis of the court in *Alvarez*, whatever its merits, would appear not to apply to the current version of the drug penalty provisions, but to be limited to the particular provision at issue in that case.[5]

Relevant Eleventh Circuit decisions support this reading of *Alvarez*. That court has held that drug quantity is not an element of the offense prescribed in

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of drug quantity are not necessary in an indictment. See *Levy*, 955 F.2d at 1105-1106.

[5] Like *Alvarez*, the other cases cited by petitioner (Pet. 8) do not involve the current version of Section 841. Indeed, many of those cases do not even involve drug statutes.

the current version of Section 841. See, *e.g.*, *United States* v. *Van Hemelryck*, 945 F.2d 1493, 1503-1504 (11th Cir. 1991); *Cross*, 916 F.2d at 623. Since the premise of the holding in *Alvarez* was that drug quantity was an essential element of the former version of the statute, it appears that the Eleventh Circuit does not regard *Alvarez* as applicable to the current version of the statute.

2. Petitioner next contends (Pet. 10-12) that the prosecutor should not have been allowed to ask defense witness Kalim Tippit: "[Did] anyone ever suggest[] to you that you should say that the cocaine and the guns [found in the search of the residence shared by petitioner, Tippit and Tippit's mother Arufa Rehman] were yours?" Gov't C.A. Br. 18 (quoting 5 R. 656). The court of appeals correctly concluded that the question was proper. Pet. App. A5-A6.

The government's cross-examination of Tippit was proper, because it showed that Tippit might be biased by the pressure from his mother to give false testimony favoring petitioner. This Court has held that cross-examination to show possible bias is a proper form of impeachment under the Federal Rules of Evidence. *United States* v. *Abel*, 469 U.S. 45, 52 (1984); accord 3 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 607[03], at 607-27 (1991) ("[T]he trier of fact must be sufficiently informed of the underlying relationships, circumstances and influences operating on the witness so that, in the light of his experience, he can determine whether a mutation in testimony could reasonably be expected as a probable human reaction."). As the court of appeals correctly determined, the pressure on Tippit to give

false testimony "was clearly relevant to the jury's evaluation of Tippit's credibility and his possible bias." Pet. App. A6.[6]

3. The court of appeals correctly held that the introduction of evidence that one of petitioner's customers died of a drug overdose was harmless error, because "[t]he evidence of [petitioner's] involvement in the cocaine conspiracy was overwhelming." Pet. App. A5. That fact-bound holding does not warrant further review.[7]

4. The court of appeals was also correct in affirming the district court's denial of petitioner's motion to suppress the evidence seized during the search of his residence. The search was conducted pursuant to a federal warrant based on a 12-page

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[6] The decisions on which petitioner relies are inapposite. See Pet. 10-12 (citing *Krulewitch* v. *United States*, 336 U.S. 440 (1949), and *Bryan* v. *United States*, 17 F.2d 741 (5th Cir. 1927)). Those cases did not involve impeachment of a defense witness; they involved the government's direct examination of its own witness as substantive proof of the defendant's guilt.

[7] Petitioner incorrectly frames the issue as whether "plea bargained accomplice testimony *alone, directly contradicted by a defendant's testimony*," can constitute evidence sufficient to render harmless an unrelated error. Pet. i. The court of appeals determined, however, that the guilty verdict was supported not only by the testimony of petitioner's accomplices but also "by the physical evidence found in [petitioner's] home." Pet. App. A5. Moreover, certain parts of petitioner's testimony were so facially incredible (see pp. 4-5, *supra*) that the jury would have been "entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, 112 S. Ct. 2482, 2492 (1992) (opinion announcing judgment of Court); *Wilson* v. *United States*, 16[illegible] U.S. 613, 620-621 (1896).

affidavit by Internal Revenue Service Special Agent Gary Gallman. Petitioner's challenge to the warrant is without merit.

In examining whether the "totality of the circumstances" supported a magistrate's finding of probable cause, reviewing courts are not to conduct a de novo review of that finding, but instead should determine only whether "the magistrate had a substantial basis for * * * conclud[ing] that a search would uncover evidence of wrongdoing." *Illinois* v. *Gates*, 462 U.S. 213, 230-231, 236 (1983) (internal quotation marks omitted). That deferential standard of review serves to encourage the use of warrants. *Id.* at 237 & n.10 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 109 (1965)). Thus, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *Ventresca*, 380 U.S. at 106 (citation omitted).

Petitioner challenges the warrant primarily on the ground that the information in the affidavit supporting the warrant was stale. Pet. 15. A "primary consideration in evaluating the staleness issue is whether the affidavit describes a single transaction or a continuing pattern of criminal conduct." *United States* v. *Tucker*, 638 F.2d 1292, 1299 (5th Cir.), cert. denied, 454 U.S. 833 (1981); accord *United States* v. *Cochrane*, 896 F.2d 635, 642 (1st Cir.), cert. denied, 496 U.S. 929 (1990). The evidence that petitioner asserts is "stale" concerned his drug trafficking prior to his 1985 arrest. That evidence, however, served to show that petitioner had been involved in drug trafficking continuously for an extended period of time and had arranged for the transportation from Florida to

Texas of significant amounts of cocaine. The primary differences in petitioner's conduct before and after his arrest stemmed from his efforts to continue his drug trafficking while unsuccessfully defending against the criminal prosecution and serving the ensuing prison sentence. Because the evidence in the affidavit concerned a continuing course of crime, and because the continuing nature of petitioner's activities was relevant to the issue of probable cause, the pre-1985 evidence was properly included in the affidavit for the magistrate's consideration.

Even setting aside the evidence that petitioner claims is stale, there was ample evidence to support the issuance of the warrant to search petitioner's residence. That evidence included informants' accounts of petitioner's involvement with cocaine trafficking after his release from prison; a description of drug records referring to petitioner that were uncovered during a March 1990 search in Miami; information regarding a July 1990 indictment of petitioner for drug trafficking; and information that petitioner violated his parole by moving in with his co-defendant from a prior drug prosecution. Gov't C.A. Br. 27-30. In sum, the affidavit contained ample evidence that petitioner was continuing to traffic in cocaine at the time of the search and was using his Houston residence to do so.

Finally, even if the affidavit supporting the warrant were inadequate to establish probable cause, suppression of the evidence seized under the warrant would be precluded under *United States* v. *Leon*, 468 U.S. 897 (1984). In *Leon*, the Court held that the exclusionary rule does not bar the admission of evidence

obtained by officers acting in good faith and in objectively reasonable reliance on a search warrant ultimately found to be defective. *Id.* at 905-925. Here, the court of appeals correctly concluded that the officers who searched petitioner's residence relied on the warrant in good faith and that their reliance was objectively reasonable. Pet. App. A7. There is no merit to petitioner's assertion (Pet. 15) that the good-faith exception to the exclusionary rule does not apply where, as here, a prosecutor reviewed the affidavit prior to its submission to the issuing magistrate. On the contrary, such consultation is evidence that the searching agent's reliance on the warrant was reasonable. *United States* v. *Fama*, 758 F.2d 834, 837 (2d Cir. 1985); cf. *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989 (1984) (in concluding that "[t]he officers in this case took every step that could reasonably be expected of them," Court observed that "Detective O'Malley prepared an affidavit which was reviewed and approved by the District Attorney.").

5. Likewise without merit is petitioner's claim (Pet. 15-20) that he was denied the effective assistance of counsel at trial. To establish that claim, petitioner must show both that his attorney's performance was objectively unreasonable and that the errors affected the outcome of the trial. *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). Petitioner cannot make either showing.

Petitioner first asserts (Pet. 16-17) that his trial attorney acted unreasonably by failing to object when the government cross-examined him about his loan-sharking and his possession of firearms after having been convicted of a felony. Petitioner fails to place

those lines of cross-examination in context. The thrust of petitioner's testimony on direct examination was that after his 1985 arrest, he became "scared to death and * * * quit selling any kind of drugs or doing business with David [LeBoeuf], period." Gov't C.A. Br. 15 (quoting 5 R. 532-533). Also on direct examination, however, petitioner admitted that he used the proceeds from his prior drug-dealing activities to engage in loan sharking and that he possessed firearms after his felony conviction. The prosecutor's brief cross-examination on those admissions pointed up the incongruity between, on the one hand, petitioner's claim that he stopped dealing in drugs out of fear of criminal sanctions and, on the other hand, his admission that he continued to engage in other illegal conduct. See Gov't C.A. Br. 14-15. Elicitation of that incongruity was proper impeachment, and petitioner's trial counsel could reasonably have decided that it was unobjectionable, and that objecting to it would only have increased its adverse impact on the defense.

Petitioner also claims (Pet. 17-20) that his trial attorney unreasonably failed to move for dismissal of the indictment for vagueness or, alternatively, for a bill of particulars. As the court of appeals correctly observed, however, "had [petitioner's] counsel made the motions he now suggests, the Government would simply have made the indictment more specific." Pet. App. A16. Petitioner thus cannot show that he was prejudiced by his counsel's failure to make those motions.

Finally, petitioner argues (Pet. 19-20) that his attorney improperly failed to object to the jury

instructions regarding multiple conspiracies and the dates alleged in the indictment. The court of appeals correctly held that the instructions, even if erroneous, did not prejudice petitioner. Pet. App. A16-A17. Petitioner provides no basis for further review of that holding.

Ultimately, petitioner's claim of ineffective assistance of counsel founders because he cannot show that the outcome of the trial would have been different absent his counsel's allegedly ineffective assistance. As the court of appeals observed, the "evidence of [petitioner's] involvement in the cocaine conspiracy was overwhelming." Pet. App. A5. Petitioner's claim was therefore properly rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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